STATE OF MICHIGAN

IN THE SUPREME COURT

Application for Leave to Appeal Prior to Court of Appeals Decision

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee

VS.

KAMERON LEO KILGO,

Defendant/Appellant

_____/

Supreme Court File
No. 151076

Court Of Appeals File
No. 325582

Wayne County Circuit Court
No. 14-009613-01-FH

THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN
Amicus Curiae Brief
IN SUPPORT OF PLAINTIFF/APPELLEE
THE PEOPLE OF THE STATE OF MICHIGAN

VICTOR FITZ (P36004)
PRESIDENT
PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN

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STATEMENT OF JURISDICTIONS AND INTEREST OF AMICUS CURIAE

On May 27, 2015, this Court entered an order requiring the parties to this Application for Leave to Appeal to file supplemental briefs in preparation for oral argument on whether this Court should grant leave. The Prosecuting Attorneys Association of Michigan is a non-profit membership organization whose members include the 83 elected Prosecutors and Assistant Prosecutors. The Court Rules permit the Prosecuting Attorneys Association of Michigan to file a brief as *amicus curiae* without seeking permission from this Court. MCR 7.306(D)(2).

COUNTER-STATEMENT OF FACTS

The Prosecuting Attorneys Association of Michigan accepts the People's statement of facts as accurate.

STATEMENT OF QUESTIONS PRESENTED

DOES THIS COURT'S DECISION IN *PEOPLE V CASH*, 419 MICH 230 (1984), REMAIN VIABLE?

Appellant answers: "No"

The People answer: "Yes"

Amicus Curiae answers: "Yes"

IS THE INABILITY TO ASSERT THE DEFENSE OF REASONABLE MISTAKE OF AGE OR FACT A VIOLATION OF DUE PROCESS OR EQUAL PROTECTION PRINCIPLES?

Appellant answers: "Yes"

The People answer: "No"

Amicus Curiae answers: "No"

ARGUMENT

PEOPLE V. CASH REMAINS VIABLE TODAY AS AN APPROPRIATE RECOGNITION OF THE LEGISLATURE'S INTENT WHEN IT ENACTED MCL 750.520 *ET SEQ.*

1. A Brief History Of "Statutory Rape" Laws

The roots of Michigan's "statutory rape" law run deep, past the time of Colonial America to the upheavals of 13th century England. At the beginning of the 13th century English common law recognized nine felonies, remembered by all first year law students by the pneumonic MR & MRS LAMB – Murder, Rape, Manslaughter, Robbery, Sodomy, Larceny, Arson, Mayhem and Burglary. The crime of rape was defined as unlawful carnal knowledge without a woman's consent. The Statute of Westminster, in 1275, was the first to codify rape, and the first to deviate from that common law understanding of rape.[1] "The King prohibiteth that none shall ravish…any Maiden within age." In modern language the Statute of Westminster criminalized sexual intercourse with a girl under the age of 12. Some 10 years later it was made a life offense. 300 years after its original enactment, the age of consent was lowered to age 10.

The rape statute enacted by the Territory of Michigan introduced a new idea by limiting the reach of the crime to those 14-years-old or older who had sexual intercourse with a girl under the age of 10. "That any person who shall have carnal knowledge of any woman, forcibly, and

[1] It is suggested that the Statute of Westminster was not, in fact, a departure from common law. "The history of the offense of statutory rape has early beginnings. The crime was created by an ancient English statute prohibiting the 'carnal knowledge and abuse' of a female child under ten years of age. R. Perkins, Criminal Law 152-53 (2d ed. 1969) (citing 4 W. Blackstone, Commentaries * 210). Despite its statutory heritage, the offense is generally considered an extension of the common law crime of forcible rape and is itself 'old enough to be a part of the common law of this country.' Perkins, at 152." *United States v. Brooks*, 841 F2d 268, 269 (CA 9, 1988).

against her will, or who shall aid, abet, counsel, hire, cause or procure any person or persons to commit the said offence, or who, being of the age of fourteen years, shall unlawfully and carnally know and abuse any woman child under the age of ten years, with or without her consent, shal1, on conviction, be punished by fine not exceeding ten hundred dollars, or solitary imprisonment at hard labor, for any term not exceeding twenty years, or both, at the discretion of the court." 2 Territorial Laws, Act of March 30, 1827, § 5, p 542.

Michigan became a state in 1837, and by 1846 the "statutory rape" law had changed to language more closely akin to that in the Statute of Westminster. "If any person shall ravish and carnally know any female of the age of ten years, or more, by force and against her will, or shall unlawfully and carnally know and abuse any female, child under the age of ten years, he shall be punished by imprisonment in the state prison for life, or for any term of years; and such carnal knowledge shall be deemed complete upon proof of penetration only." 1846 RS, ch 153, § 20. The statute was amended in 1887 to raise the age of consent to 14-years-old. In 1895 the age of consent was increased again, this time to 16-years-old, where it has remained. 1897 CL, ch 256, § 20.

2. Mistake Of Fact As To Age As A Defense To Statutory Rape

The English Courts began to recognize and discuss the defense of mistake of fact, in general, as far back as the 1600s. *State v. Yanez,* 716 A2d 759 (R.I. 1998). But it wasn't until the latter half of the nineteenth century that mistake-of-fact as to the victim's age was raised in statutory rape cases. *Id*. When it was raised during that time, no English or American court accepted the defense. *United States v. Brooks*, 841 F2d 268 (CA9, 1988).

Michigan courts joined its sister states in the rejection of the defense. The first mention of the *amici* could discover is in *People v. Gengels*, 218 Mich 632 (1922). Gengels was convicted at

trial of statutory rape. The trial court permitted the prosecutor to cross-examine the defendant at length about possible similar acts, and called three girls as rebuttal witnesses to tell the jury about the alleged acts. The prosecutor successfully argued to the trial court that the evidence of the prior, similar acts of defendant were relevant to show the defendant's intent in doing the charged acts.

The Michigan Supreme Court disagreed and overturned Gengels' conviction. The evidence of the defendant's other acts should not have been admitted to prove his intent, because "proof of the intent goes with proof of the act of sexual intercourse with a girl under the age of consent. It is not necessary for the prosecution to prove want of consent. Proof of consent is no defense, for a female child under the statutory age is legally incapable of consenting. **Neither is it any defense that the accused believed from the statement of his victim or others that she had reached the age of consent.** 33 Cyc. 1438, and cases cited." *Id.* at 641(emphasis added). This holding makes clear that Michigan's statutory rape law has always been a strict liability offense.

It was not until 1964 and the decision in *People v. Hernandez*, 61 Cal 2d 529; 39 Cal Rptr 361; 393 P2d 673 (1964), that an American court recognized mistake of age as a defense. The decision was not on constitutional grounds, but rather on the court's interpretation of California's criminal code. California defined rape as sexual intercourse with another who was under the age of 18. California's criminal code included a section imposing an intent requirement of at least criminal negligence, and another recognizing a mistake of fact as a defense to that intent element. The *Hernandez* court saw no expression of legislative intent to preclude the defense in cases charging sexual intercourse with someone under 18-years-old.

The reach of *Hernandez* was drastically limited by subsequent events. California courts refused to follow *Hernandez* when interpreting statutes criminalizing lewd acts on a victim under the age of 14, *People v. Olsen* 36 Cal 3d 638; 205 Cal Rptr 492; 685 P2 52 (1984), and lewd acts on a victim 14 or 15-years-old when the actor is 10 or more years older, *People v. Paz,* 80 Cal App 4th 293; 95 Cal Rptr 2d 166 (2000). Courts in other states have been reluctant to follow *Henandez's* lead. See*, United States v. Brooks*, 841 F2d 268 (CA9, 1988).

3. Challenging the Need to Protect Teenagers

Appellant's arguments for changing centuries of established law are premised on one assertion: kids are different these days. Appellant writes, "There is clearly a compelling state interest to protect a minor, 10 years or younger. It could be argued that there is a compelling state interest to protect a person under 13 years of age, but in today's society, a fully developed, mature 15-year-old is fully conscious of his or her actions and aware of the possible consequences." [2]

Has the world changed as much as Appellant's citation of the incidence of teen-age sex suggests? It is certainly true that today's teenagers have sex, and may well be true that the incidence of sexual intercourse during the teenage years has increased over time, but those facts do nothing to advance Appellant's cause. Appellant cites no research to suggest that the physical, emotional, and societal risks of sexual activity by teens has diminished over time. See, *United States v. Thomas*, 159 F3d 296 (CA 7, 1998) ("In addition, intercourse with an older male involves an enhanced risk of sexually transmitted disease because an adult man is more likely to be infected than a teenager. And there is evidence that a 16 year old girl is at greater risk of

[2] Appellant's Reply Brief, pg. 5.

physical injury, in the event that she becomes pregnant, than if she were older, mainly because she is less likely to obtain good prenatal care.) (Citations omitted.)

Nor has Appellant produced any research that suggests that the judgment of a 15-year-old in 2015 is greater than that of a 15-year-old from past decades. Current research adds considerable weight to our intuitive knowledge that the teenage years are a time of poor judgment and risk taking. BJ Casey, PhD and Rebecca M. Jones, MS, "Neurobiology of the Adolescent Brain and Behavior: Implications for substance use disorders," 49 J Am Acad Child Adolesc Psychiatry 1189 (2010); Steinberg,L. "A Social Neuroscience Perspective on Adolescent Risk-Taking," 28 Developmental Review 78 (2008).

The United States Supreme Court has more than once recognized the crucial difference between children and adults, most recently in *Miller v. Alabama*, ___ U.S. ___; 132 S Ct 2455, 183 L Ed 2d 407 (2012). In *Miller* the Court ruled unconstitutional state statutes imposing mandatory life-without-parole on 14-year-old homicide offenders. The Court relied on brain science and social science research showing the "fundamental difference between the juvenile and adult mind," and that "adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance." *Id* at 2464, n. 5. Children lack maturity and have an underdeveloped sense of responsibility, which often leads to recklessness, impulsivity, and heedless risk-taking. In addition, children are more vulnerable to the influence of negative pressures from peers and family. *Id.*

In short, the teen-age years remain a time of risk taking and poor judgment, and that makes a teen today incredibly vulnerable to anyone who is willing to enhance and exploit that vulnerability. What has changed is the number of opportunities for finding and exploiting

vulnerable teens. Advances in electronic communication through cell phones and, as in this case, the internet have expanded the opportunity to take advantage of a teen's poor judgment.

THERE IS NOT NOW, AND NEVER HAS BEEN, A DUE PROCESS RIGHT TO ASSERT A MISTAKE OF FACT DEFENSE

Appellant apparently has no quarrel with whether the Michigan Legislature had the authority to make the statute a strict liability offense. *Lambert v. California*, 355 US 225; 78 S Ct 240; 2 L Ed 2d 228 (1957); *People v. Quinn,* 440 Mich. 178, 185; 487 N.W.2d 194 (1992). Nor does Appellant argue that the Legislature did not *intend* to make the statute a strict liability offense. Rather, Appellant argues that the understanding of due process and *mens rea* has grown so as to make the application of strict liability a violation of the Constitution.

Appellant cites no authority holding that strict liability in statutory rape cases is unconstitutional. Indeed, he builds his foundation on cases that explicitly recognize (but do not hold) that imposition of strict liability in statutory rape is and always has been sound.

In *Morissette v. United States*, 342 US 246; 72 S Ct 240; 96 L Ed 288 (1952), upon which Appellant leans heavily, the U.S. Supreme Court was called upon to determine whether a federal larceny statute, silent on the intent issue, nevertheless included such an element. The decision noted "Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.'" *Id* at 251. In the very next sentence the decision deals a blow to Appellant's argument by acknowledging a few, long-recognized exceptions, the first example of which is statutory rape. *Id* at 251, n. 8.

That reliance on *Morissette* is misplaced is illustrated by *United States v. Mozie,* 752 F3d 1271 (CA 11, 2014); cert. den. __ US __ ; 135 S Ct 422; 190 L Ed2d 305 (2014). Mozie was

convicted of child sex trafficking. He ran what the Court aptly called a "den of degradation" to which he would lure minor girls, one as young as 13, posing as the head of a modeling agency. Instead of modeling, the girls stripped and had sex for money. Mozie challenged the constitutionality of the trafficking statute because it did not require actual knowledge of his victims' age.

The Court disagreed, noting that the United States Supreme Court has held that lawmakers have considerable latitude to exclude the *mens rea* element when defining criminal offenses, and that due process does not require it. *Id.* The 11th Circuit likened child sex trafficking to statutory rape laws, and said, " federal courts uniformly have rejected claims that the Constitution requires the government to prove that a defendant . . . knew that the victim was underage, or that such a defendant has a constitutional right to the defense that he made a reasonable mistake as to the victim's age." *Id.* at 1282 (citations omitted).

1. The Decision to Preclude the Mistake of Age Defense Is Not Arbitrary or Capricious

The Legislature's power to exclude a *mens rea* requirement in criminal statutes is not without limits. The exercise of that power must be consistent with due process. "In order to show that the exercise of that power is inconsistent with due process, appellant must demonstrate that the practice adopted by the legislature 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder v. Massachusetts*, 291 US 97, 105; 54 S Ct 330, 332; 78 L Ed 674 (1934)." *U.S. v. Ransom*, 942 F2d 775, 777 (CA 10, 1991).

A statute very similar to Michigan's survived just such a challenge in *Utah v. Martinez,* 2000 UT App 320; 14 P3d 114 (2000). Martinez entered a conditional guilty plea to unlawful sexual activity with a minor after the trial court refused his request to raise a mistake of age

defense, holding that Utah's statute was a strict liability crime. Martinez appealed, arguing the statute was not a strict liability crime, and if so, was unconstitutional.

The statute under which Martinez was convicted, Utah Code Ann. § 76-5-401(2)(a), defines unlawful sexual activity with a minor as sexual intercourse with another 14 years of age or older, but younger than 16 years of age, under circumstances that do not amount to more serious rape or forcible rape crimes. The crime is a felony if the actor is 3 or more years older than the victim, and a misdemeanor if the actor is less than 3 years older. Sexual activity with minors under 14 is a more serious crime. Sexual activity with minors 16 or 17 years old is a less serious crime. Utah statutes expressly provided a mistake of age defense if a minor victim is over the age of 16.

The Utah court first addressed the due process argument, holding that the legislature's determination to preclude the defense for sexual activity with minors under the age of 16 "offends no deeply-rooted and fundamental tradition of due process. *Martinez*, at 119.

The structure of the Michigan's CSC statute mirrors Utah's in the different levels of protection given minors of different ages, and the absence of a mistake of age defense for victims under 16-years-old. To be sure, sexual penetration with another between 13 and 16-years-old is a serious offense. Sexual contact with another under the age of 13 is a serious, 15-year felony. MCL 750.520d. Sexual contact with another who is between 13 and 16 years old is a lesser offense, and then only if the offender is four or more years older than the victim. MCL 750.520e. This gradation of offenses reflects the judgment that contact offenses are less serious than penetration offenses, and that sexual contact with an adolescent is less serious still, or no crime at all if done with age-peers. And like the Utah statute this "reflects our legislature's careful consideration of the level of protection required for minors of different ages." *Martinez,* at 119.

Martinez's substantive due process claim fared no better. To satisfy substantive due process, a statute needs only to rationally further a legitimate governmental interest. Relying on *US v. Ransom*, *supra,* the Utah court held its statute "protects children from sexual abuse by placing the risk of mistake as to a child's age on an older, more mature person who chooses to engage in sexual activity with one who may be young enough to fall within the statute's purview." *Martinez,* at 119, quoting *Ransom*, 942 F.2d at 777.

Michigan has this same interest in protecting the most vulnerable from those risks. There is nothing capricious in choosing to set the age where it is. It is not arbitrary or capricious to refuse to depart from centuries-old law and not allow a mistake of age defense. Unquestionably, the Legislature could have drawn the lines differently, or provided such defense. Appellant would have the Court draw the line for the Legislature.

The state of the law is summed up nicely in *Commonwealth v. Miller*, 385 Mass. 521, 432 N.E.2d 463 (1982). "The United States Supreme Court has never held that mistake of fact is a defense to a charge of statutory rape…. Strict criminal liability is not necessarily a denial of due process of law, and in the case of statutory rape it is not." *Id,* at 465-466.

SOUND POLICY CONSIDERATIONS SUPPORT THE CONSTITUTIONALITY OF STRICT LIABILITY AND THE CONTINUED VIABILITY OF *CASH*

1. The Far Reaching Consequences Of Imposing A Mistake Of Fact Defense

Appellant is not asking this Court to change just one part of one statute. Rather, he seeks a ruling tantamount to requiring an element of *mens rea* in every criminal statute as a matter of constitutional mandate. On what principled ground can one stand to argue that the mistake of fact defense is required for one fact, in one section of only one statute, and not all others? What is to

stop one charged with criminal sexual conduct first-degree, for engaging in sexual penetration with a child under the age of 13, from asserting that he or she reasonably believed the victim was 13-years-old? If the defense is a constitutional requirement when the defendant is close in age to the victim, why not for one 10 or 15 years older?

There is a strong undercurrent to Appellant's argument that allowing a mistake of fact as to age defense is protecting the autonomy of adolescents to decide when and with whom to become sexually active. This flies in the face of centuries of human experience with adults exploiting children. It hews closer to the pernicious belief that men must be protected from the dangers of the sexually aggressive 14 or 15 year old, "young in years but old in sin and shame." [3] That belief is on full display in Appellant's Application for Leave to Appeal in the Court of Appeals. He accuses her of committing a criminal fraud. He states that the victim has not claimed that this was her first sexual encounter, which proves she is sexually promiscuous and has had multiple sexual partners whose names she did not know. This criminal charge, as Appellant would have us believe, was brought simply because the defendant (a victim of a criminal fraud) is the one partner she can identify. This notion is offensive to men, as it defines them as incapable of resisting the sexual advances of a child. It is, of course, offensive and dangerous to girls as it is a return to blaming victims.

At present, consent is not a defense to age-based sexual assault prosecutions, as well as many others. Allowing a mistake of fact defense ostensibly does not change that fact, but in

[3] *State v. Snow* (Mo.1923) 252 S.W. 629 at page 632. The entire passage is quoted with approval in *People v. Hernandez*, 61 Cal 2d 529, 531 n. 1, "A number of callow youths, of otherwise blameless lives…fell under her seductive influence. They flocked about her,…like moths about the flame of a lighted candle and probably with the same result. The girl was a common prostitute. ... The boys were immature and doubtless more sinned against than sinning. They did not defile the girl. She was a mere 'cistern for foul toads to knot and gender in.' Why should the boys, misled by her, be sacrificed? What sound public policy can be subserved by branding them as felons?"

reality necessarily opens the door to the admission of evidence of consent to establish the reasonableness of the defendant's belief that his victim was over the age of consent. The same is necessarily true for a whole range of evidence that is not now relevant or admissible. The focus of the trial will return to the appearance of the victim, his or her "lifestyle" or sexualized behavior, and even prior sexual activity.

Although the present rape shield statute should control admission of prior sexual activity, holding that the "reasonable mistake of age" defense is constitutionally mandated will erode these protections. It easily follows that evidence that is probative of the constitutionally mandated defense is itself, constitutionally mandated. The relevance of prior sexual activity will again have to be litigated in this new context. This all but guarantees the lives of even very young victims will be subjected to extraordinarily intrusive scrutiny in open court.

Amicus is not alone in foreseeing the negative consequences that would flow from a court-imposed mistake of age defense. The Supreme Court of Rhode Island expressed these very concerns in *State v. Yanez,* 716 A2d 759 (R.I. 1998). Yanez was 18 years old when he engaged in sexual intercourse with the 13-year-old victim, given the pseudonym "Allison" by the Court. At trial, Yanez's counsel made several attempts to admit evidence of Yanez's mistaken belief that she was 16, including evidence to establish her apparent maturity in light of her appearance, physical development, and demeanor. The trial judge rebuffed the offers, and Yanez was convicted.

After disposing of the very arguments made by appellant in this case, the Court turned its attention to the social and policy implications that would flow from a mistake of age defense. Those implications include opening the door to evidence of past sexual history, rape shield notwithstanding. If the victim was to be cross-examined "concerning her 'evident sexual

experience,' as well as her 'developed physical appearance, her poise, [and] her association with older teenagers,' in order for a defendant to establish his or her reasonable belief that the victim was at least sixteen-years-old, we conclude that such action should come from the Legislature and not from this Court. This is a door best left closed until it is opened, if at all, by those who are better able to debate all the consequences." *Id.,* at 770.

The Rhode Island court also expressed concern that, like here, the defense of mistake of age would be available to *all* defendants, not just the 18-year-old ones. In addition, allowing the defense will "inevitably lead to the presentation of evidence concerning the issue of consent. In order to avail oneself of the mistake of age defense, the accused, like Yanez in this case, would be required to allege not only that he or she reasonably believed the victim to have been at least sixteen years of age but also that the victim consented to the act. This defense would result in the prosecution having the burden of proving beyond a reasonable doubt the fact that the victim did not consent to a crime in which the Legislature has decreed that consent is irrelevant." *Id.*

The probable, if not certain, result is that victims of sexual assault, already reluctant to participate in the criminal justice system, will be even more hesitant to report as their lives are once again laid bare. The already dismal rate of reporting to law enforcement will fall even lower. Jones, S., Alexander, C., Wynn, B., Rossman, L. & Dunnuck, C. "Why Women Don't Report Sexual Assault To The Police: The Influence Of Psychosocial Variables And Traumatic Injury," The Journal of Emergency Medicine, 2008.

Investigators may turn away from a victim-centered, offender-focused investigation and return to the judgmental investigation into the victim's behavior, history, and lifestyle. Empirical research has established that this would have a profoundly negative impact on victims, leaving them caught between the Scylla and Charybdis of not reporting, or reporting and being re-

victimized and re-traumatized. Campbell, R. “Rape Survivors Experiences With the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference?” 12 Violence Against Women Pg. 1, 2006.

CONCLUSION AND RELIEF REQUESTED

Wherefore, amicus Prosecuting Attorneys Association of Michigan respectfully requests that application for leave to appeal be denied.

Respectfully Submitted,

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